UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

COASTAL INTERNATIONAL SECURITY, INC.

Employer

and **Case 05-RC-154859**

INTERNATIONAL UNION, SECURITY, POLICE AND FIRE PROFESSIONALS OF AMERICA (SPFPA)

Petitioner

and

UNITED SECURITY & POLICE OFFICERS OF AMERICA (USPOA)

Intervenor

DECISION AND ORDER

On June 25, 2015, the International Union, Security, Police and Fire Professionals of America (the Petitioner) filed a petition seeking to represent a unit of all full-time and part-time security officers employed by Coastal International Security (the Employer) at the Food and Drug Administration facility, located at 10001 New Hampshire Avenue, in Hillandale, Maryland. There are between 10 and 18 employees in the proposed unit.[1] The United Security and Police Officers of America (the Intervenor), the incumbent union currently representing the petitioned-for unit, intervened.[2]

On July 6, 2015, a hearing was held on the petition before a hearing officer of the National Labor Relations Board (the Board). The Petitioner and the Intervenor fully participated in the hearing. The Employer did not appear at the hearing, but agreed to stipulations regarding the petitioned-for unit and the Board's jurisdiction, which were accepted into the record as Board Exhibit 2.[3] The parties stipulated that the following bargaining unit is appropriate for the purposes of collective bargaining:

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[1] The Petitioner asserts there are 18 employees; the Intervenor asserts there are between 10 and 13.

[2] The parties stipulated, and I find, that the Petitioner and the Intervenor are labor organizations within the meaning of Section 2(5) of the Act.

[3] The parties stipulated, and I find, that the Employer, Coastal International Security, Inc., a South Carolina corporation with a main office in Upper Marlboro, Maryland, is engaged in providing security services at the Food and Drug Administration facility located at 10001 New Hampshire Avenue, in Hillandale, Maryland. During the past 12 months, a representative period, the Employer, in conducting its business operations described above, has been engaging in providing services to the United States Government in excess of $50,000. The parties further stipulated, and I find, that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

> All full-time and part-time armed and unarmed security officers performing guard duties as defined in Section 9(b)(3) of the National Labor Relations Act employed at the Food and Drug Administration facility at 10001 New Hampshire Avenue, in Hillandale, Maryland, and excluding all office clerical employees, professional employees, and supervisors as defined by the Act

I have considered the evidence and arguments presented by the parties,[4] and for the reasons described below, I conclude that the petition is barred by the successor bar doctrine set forth in *UGL-UNICCO Service Company*, 357 NLRB No. 76 (2011). As such, there is no question concerning representation and I am dismissing the petition in this matter.

I. ISSUES AND POSITION OF PARTIES

The parties presented two issues at the hearing. The first issue is whether the petition is barred by the successor bar doctrine set forth in *UGL-UNICCO Service Company*, 357 NLRB No. 76 (2011). The second issue is whether the Intervenor waived its right to argue for the application of the successor bar doctrine by not explicitly referring to it in its statement of position.

The Petitioner claims that the successor bar does not apply because the reasonable time to bargain expired prior to its filing of the petition. The Petitioner argues that under the factors set forth in *Lee Lumber & Building Material Corp.,* 334 NLRB 399 (2001), the reasonable time for the Intervenor to bargain in this case should be six months, primarily because the Intervenor and the Employer have made no progress in negotiations and are thus not close to concluding an agreement. According to the Petitioner, the Intervenor's insulated period of six months should start at the latest from January 6, 2015, which is the date of the last communication between the Intervenor and the Employer regarding bargaining. The Petitioner also argues that the Intervenor waived the application of the successor bar by failing to note it on the Intervenor's statement of position, where the Intervenor instead wrote "successor clause" as the reason for its objection to the petition.

The Intervenor argues that the successor bar warrants dismissal of the petition. The Intervenor claims its insulated period under the successor bar should start on January 5, 2015, and that it should extend beyond six months because the delay has been the Employer's fault. The Intervenor claims it has been attempting in good faith to negotiate with the Employer, and thus deserves more time to do so.

II. FACTS

The Employer is a security contractor engaged in providing security services at the Food and Drug Administration facility, located at 10001 New Hampshire Avenue, in Hillandale, Maryland

[4] I permitted the parties to file post-hearing briefs, limited to ten pages and to the issue of successor bar. However, none of the parties filed a brief.

(hereinafter the FDA facility). The Employer took over the contract for providing security guard services at the FDA facility on October 1, 2014, hiring at least fifty percent of the employees who previously worked there for the predecessor contractor.

At the time the Employer took over the security contract for the FDA facility, the Intervenor was the exclusive collective-bargaining representative of all full-time and part-time armed and unarmed security officer performing guard duties there. The Intervenor has represented unit employees working at the FDA facility since March 25, 2011, when this Region certified the Intervenor as the exclusive collective-bargaining representative of the security guards at the FDA facility based on a secret-ballot election in Case 5-RC-016628. At that time, American Security Programs held the contract for guard services at the FDA facility, and entered into a Memorandum of Agreement with the Intervenor covering the economic terms of the guards' employment. The parties did not negotiate a collective-bargaining agreement because American Security Programs had lost the contract for the FDA facility and would no longer be the employer there.

Sometime between March and July 2013,[5] Master Security Company, LLC (Master Security) took over the contract for the guard services at the FDA facility. Master Security and the Intervenor bargained and reached agreement in 2014.[6]

On October 1, 2014, the Employer took over the contract for guard services at the FDA facility. The Employer hired a majority of its employees for the contract from Master Security, and the Employer continued the terms and conditions that the Intervenor had agreed on with Master Security.[7] Assane Faye, the Intervenor's President, knew the Employer was taking over because employees at the facility had called him in September and told him. In October, Faye called the Employer's contact for labor relations, Maureen Dolan (the Employer's litigation manager),[8] at least three times to request bargaining, but Faye failed to reach her. Dolan did not respond to Faye's calls, so on November 23, Faye sent Dolan a letter requesting bargaining and proposing December 10 and 16 as dates for the initial bargaining session. Receiving no response to the letter dated November 23, Faye e-mailed Dolan and Gail Heath (the Employer's labor

[5] Faye believes Master Security took over in March 2013, though admits he "don't [sic] remember the dates." SPFPA's witness, security guard Anthony Barber, states that Master Security took over around July 2013.

[6] Faye testified concerning the purported collective-bargaining agreement between the Intervenor and Master Security, and he attempted to introduce that agreement into the record as Intervenor Exhibit 1. The Petitioner objected, and the transcript indicates that the exhibit was to be placed in the record as a rejected exhibit. However, the record indicates that the court reporter did not receive a copy. Subsequent to the hearing, the parties at the hearing stipulated that a document purporting to be a collective-bargaining agreement between Master Security and the Intervenor was the same that had been marked for identification at the hearing as Intervenor Exhibit 1. For purposes of this decision, I need not determine whether that document was sufficient as a contract, and there does not seem to be any meaningful dispute that Master Security and the Intervenor had an agreement regarding employees' terms and conditions of employment.

[7] Faye testified that the Employer continued the terms and conditions of employment without modification because "[n]obody brought [changes] to my attention." There is no evidence in the record, however, regarding whether the Employer expressly adopted in writing the terms and conditions of employment that existed under its predecessor, Master Security.

[8] Faye identifies Dolan as the Employer's labor relations specialist, though according to her e-mail signature block, she is the Employer's litigation manager, and Gail Heath is the labor relations specialist. Regardless, no party contends that Dolan was the wrong contact for bargaining, and the e-mails in Petitioner Exhibit 2 demonstrate that Dolan was involved in the bargaining process and passed along Faye's communications to Heath.

relations specialist) on November 26, notifying them of his efforts to get in touch with them to bargain and threatening to file an unfair labor practice charge based on their refusal to bargain if he did not hear back from them that day. The Employer did not respond that day, but Faye did not file a charge.

On January 5, 2015, Heath e-mailed Faye regarding his request to bargain. Heath acknowledged receipt of Faye's request to bargain and apologized for not responding sooner, citing other matters and the holidays as the reasons for delay. Heath told Faye she was communicating with her management team and hoped to provide him with proposed dates for initial bargaining within a week. On January 6, Faye replied, saying he looked forward to hearing from her, and indicating that he would look for and send her the most recent collective-bargaining agreement. That was the last communication, by e-mail or any other means, between the parties regarding bargaining—Heath never provided the proposed bargaining dates, and Faye never followed up to get the dates, or to bargain. At the time the hearing opened, the Intervenor and the Employer had not held or even scheduled a single bargaining session, and Faye had not filed any charges regarding the Employer's failure to bargain.[9]

Between October 1, 2014 and July 6, 2015, Faye did not hold any meetings with the employees it represented at the FDA facility to discuss the bargaining. The last union meeting was held in September 2014, when some guards apparently learned for the first time that there was a collective-bargaining agreement in place, which they received from a supervisor; those guards called Faye to discuss the collective-bargaining agreement. The two guards who testified at the hearing, both of whom were officers at the FDA facility since prior to September 2014, testified that they had no other communications or contacts with the Intervenor, and had not seen notices for or heard about any other union meetings. Furthermore, neither was aware of any shop stewards or any representatives of the Intervenor at the FDA facility. In fact, one of the guards testified that the hearing in this matter was the first time he had met any representative of the Intervenor at all, which was Assane Faye.[10]

On June 25, the Petitioner filed the petition in this case.

III. ANALYSIS

As explained below, I conclude that the Petitioner filed the petition within the reasonable period of bargaining accorded to the Intervenor by the successor bar doctrine set forth in *UGL-UNICCO Service Company*, 357 NLRB No. 76 (2011). As such, there is no question concerning representation and I shall dismiss the petition.

[9] On July 6, the same day as the hearing, the Intervenor filed an unfair labor practice charge, Case 05-CA-155536, against the Employer, alleging that it had refused to recognize and bargain with the Intervenor for the past six months. On July 7, one day after the hearing, the Intervenor filed an unfair labor practice charge, Case 05-CA-155537, against the Employer, alleging that it failed to implement a wage increase in March. The Region is currently investigating both charges.

[10] Faye claimed he scheduled a number of meetings for members at the FDA facility in the past six months, but was unable to provide even approximate dates. He also stated that he held these "meetings" by a guard post and that nobody attended them.

A. The Successor Bar Doctrine

In *UGL-UNICCO*, the Board restored the "successor bar" doctrine it had announced in *St. Elizabeth Manor, Inc.,* 329 NLRB 341 (1999) and then subsequently discarded in *MV Transportation,* 337 NLRB 770 (2002). Under the now-restored doctrine, when a successor employer acts in accordance with its legal obligation to recognize an incumbent union, that union is entitled to represent the employees in collective bargaining with the successor employer for a reasonable period of time, without challenge to its representative status. *UGL-UNICCO Service Co.,* 357 NLRB No. 76, slip op. at 11.

After restoring the doctrine, the Board then proceeded to define the "reasonable period of bargaining" in which the incumbent union would be protected from challenge. *Id*. Where an employer expressly adopts the predecessor's terms and conditions of employment, the reasonable period of bargaining will be six months measured from the date of the first bargaining meeting. *Id.* at 12. On the other hand, where an employer does not expressly adopt its predecessor's terms and conditions of employment, the reasonable period of bargaining can be extended beyond the minimum six months, up to a maximum of one year "from the date of the first bargaining meeting between the union and the employer." *Id*. at 12-13. In such cases, the Board will apply the following multifactor analysis, as set forth in *Lee Lumber & Building Material Corp.,* 334 NLRB 399 (2001), to determine whether the initial six-month insulated period should be extended:

> (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.

Id. at 12 (internal quotes omitted). "The burden of proof will be on the party who invokes the 'successor bar' to establish that a reasonable period of bargaining has *not* elapsed." *Id*. at 13 (emphasis in original).

The Board has been clear that the end of the insulated period must be "measured from the date *of the first bargaining meeting* between the union and the employer." *Id*. (emphasis added). As the Board explains, "a union can only demonstrate its effectiveness in negotiations once bargaining has actually commenced," and thus "the relevant benchmarks identified in the *Lee Lumber* multifactor test are measured from the first bargaining meeting between the parties." *Americold Logistics, LLC*, 362 NLRB No. 58, slip. op. at 5 (2015)(using the similar recognition bar to bar a petition). The parties' first bargaining meeting is thus the date from which to calculate when the insulated period will end. It is not, however, when the bar begins. *Id.* The bar begins when the employer succeeds a predecessor and triggers its obligation to bargain with the union. *See id.* Thus, though the bar *begins* when the successor employer is first required to recognize and bargain with the union, it *ends* anywhere from six to twelve months from a later date: the date of the parties' first bargaining meeting. *See id.* (finding decertification petition filed over a year after union's recognition, but eight months after parties' first bargaining session,

to be within the reasonable period of bargaining); *see also Paragon Systems, Inc.*, Case 31-RC-126224, 2014 WL 7051294 (Dec. 15, 2014) (not reported in Board volumes) (affirming dismissal of petition filed over six months after successor employer took over operations, but only one month after parties' first face-to-face bargaining session, because minimum six-month period had not elapsed).

B. The Petition Was Filed Prior to the Expiration of the Successor Bar

Applying existing Board law, I find that the petition is barred because the reasonable period of bargaining has not ended. The bar took effect on October 1, 2014, when the Employer succeeded Master Security as the security contractor at the FDA facility and hired, as a majority of its employees at the site, individuals who previously worked for Master Security at the site and who were represented by the Intervenor. The evidence adduced at the hearing does not indicate that the Employer expressly adopted the previous collective-bargaining agreement between Master Security and the Intervenor, and the parties are thus bargaining over an initial contract, current Board law provides the Intervenor with a bar that will expire at some point no earlier than six months from the first bargaining session.[11] *UGL-UNICCO Service Company,* 357 NLRB slip op. at 11. Since the Intervenor and the Employer have not met for their first bargaining session, current Board law provides that the expiration for the reasonable period of bargaining is at least six months away. Therefore, the successor bar is still in effect.

The Petitioner argues that the e-mail exchange between the Intervenor and the Employer on January 5 and 6 constitutes the first bargaining meeting, but that communication fails to fall within even the broadest definition of a bargaining meeting. The e-mails involved a request from the Intervenor for the Employer to identify some proposed dates for the parties' initial bargaining meeting, and the Employer's response promising to provide some proposed dates in the future. The parties' e-mails were not an exchange of substantive bargaining proposals,[12] nor did they contain any discussion of employees' wages, hours, or other terms and conditions of employment. I conclude that the parties' January 5 and 6 e-mails did not constitute a bargaining meeting between the Intervenor and the Employer.[13]

The Petitioner also argues that principals of fairness and equity require a finding that the reasonable time for bargaining has elapsed in this case, claiming that the Intervenor has been given a fair chance to succeed at bargaining, which is the goal of the successor bar. *See UGL-UNICCO Service Co.*, 357 NLRB slip op. at 9. I am not unsympathetic to the Petitioner's

[11] Where a successor employer expressly adopts its predecessor's collective-bargaining agreement with an incumbent union, the successor bar period is six months from the first bargaining session between the successor employer and the incumbent union. In this case, since the Intervenor and the Employer have not held a first bargaining session, it is immaterial whether the Employer expressly adopted Master Security's existing terms and conditions of employment, because the successor bar runs until at least six months from the date of the parties' first bargaining session.

[12] That is not to say that an exchange of bargaining proposals would have constituted the first meeting. *See Paragon Sys., Inc.*, 2014 WL 7051294 (affirming Regional Director's decision to dismiss petition based on his finding that first bargaining meeting was parties' face-to-face meeting rather than earlier email exchange of proposals).

[13] Even if the e-mails did constitute a bargaining meeting, the petition was filed within six months of January 6 and thus would still be barred under the successor bar.

frustration. It is hard to conclude that the Intervenor has not had a fair chance to succeed at bargaining, even though it has not met with its members or taken the first step toward bargaining a collective-bargaining agreement with the Employer in over eight months. Such facts distinguish this case from others involving application of the successor bar despite delays in initial bargaining, which contain evidence of reasonable diligence by a union to begin bargaining. *See, e.g., Americold Logistics, LLC*, 362 NLRB No. 58 at 1 (union provided evidence that four-month delay in initial bargaining was due to time needed for union to meet with employees in two warehouses, elect stewards and set bargaining goals, and to employer's unavailability). I thus understand the sentiment that, in light of the Intervenor's lack of diligence in seeking to begin bargaining, applying the successor bar to provide the Intervenor a longer "reasonable period of time" is, in fact, unreasonable. I have concerns about applying the successor bar in these circumstances, and question whether the Intervenor's own lack of diligence should tip the balance between the competing priorities of allowing employees the freedom to fully exercise their Section 7 right to choose whether to be represented by a particular union versus providing an incumbent union the stability of an insulated period free from challenge within which to negotiate with an employer.

However, the Board does not appear to have made any exception to the application of the successor bar based on a union's lack of diligence in pursuing bargaining. Instead, it has applied a bright-line rule that the successor bar begins at the time of succession and ends at a minimum of six months from the date of the first bargaining session. *Id.* at 5. The petition was filed within that time and thus, under current Board law, I find that it is barred.

C. The Intervenor Has Not Waived the Right to Litigate the Successor Bar Issue

The Petitioner argues that the Intervenor waived its right to litigate the issue of the successor bar because the Intervenor referred only to a "successorship clause" in its statement of position. This argument fails. The Intervenor's statement of position gives reasonable notice of the successor bar issue under the circumstances. Writing for the Intervenor, Faye answered "yes" to the question, "Is there a bar to conducting an election in this case" on the statement of position, referring to the last communication between the parties and stating "we had time to bargain." Faye then referred to a "successorship clause" in another box, and it is clear from the transcript that Faye, who is not a lawyer, refers to the successor bar as the successorship clause. While the Intervenor could have been more precise on its statement of position, it would serve no purpose to preclude the lawful application of the successor bar due to a non-lawyer representative's good-faith, though inartful, representations. Furthermore, while the Petitioner appeared at the hearing and argued that the issue of the successor bar was not properly raised by the Intervenor, the Petitioner was also clearly ready to present evidence and arguments against the possible application of the successor bar, and evinced no harm by any lack of notice. I find that the issue was thus not waived.

IV. CONCLUSION AND FINDINGS

It is hereby ordered that the petition in this matter is dismissed.

RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67(c) of the Board's Rules and Regulations, you may obtain a review of this action by filing a request with the Executive Secretary of the National Labor Relations Board. The request for review must conform to the requirements of Section 102.67(d) and (e) of the Board's Rules and Regulations and must be filed by August 14, 2015.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to www.nlrb.gov, select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

(SEAL)

/s/ Charles L. Posner

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Dated: July 31, 2015